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Supreme Court, U.S.
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No. 02-485

In the

Supreme Court of the United States

SAM and MARIA CARDIELLO,

Petitioners,

v.

THE MONEY STORE, INC., TMS MORTGAGE, INC., and THE MONEY STORE/EMPIRE STATE INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF

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REPLY BRIEF IN FURTHER SUPPORT OF PETITION

In their initial papers, Petitioners demonstrated that the decision rendered by the Second Circuit significantly undercuts the protections Congress afforded borrowers under the Truth in Lending Act ("TILA"), 15 U.S.C. § 1601, and the Real Estate Settlement Practices Act ("RESPA"), 12 U.S.C. § 2605 in numerous fundamental respects:

(1) by concluding that – *despite* RESPA's language prohibiting lenders from "taking any action" before investigating a borrower's claim that an amount demanded by the lender is not owed – lenders are permitted to send letters threatening foreclosure over the disputed amount;

(2) by concluding that -- *despite* the statutory damage remedy afforded by the statute – RESPA requires actual damages to bring a claim;

(3) by concluding that – *despite* RESPA § 2605's language requiring lenders to "notif[y] the person concerned of the error" – a lender may satisfy RESPA without acknowledging its error;

(4) by concluding that – *despite* provisions in TILA prohibiting lenders from charging more than the amount originally disclosed -- claims alleging improper payment demands may routinely be barred by the statute of limitations, since they "accrue at the time loans are made, not upon each payment inconsistent with" the original disclosure; (App. 11a)

(5) by concluding that – *despite* an unbroken line of federal appellate authority to the contrary – equitable tolling cannot apply absent affirmative concealment by the defendant. (App. 10a-11a)

Unable to counter Petitioners' claim that each of these conclusions represents a substantial departure from existing law, Respondents resort to a series of misrepresentations in an effort to divert this Court's attention from the important federal questions at issue. Chief among these efforts is Respondents' repeated claim that it demanded additional amounts from borrowers only "if borrowers made late payments, as the Cardiellos had done." (Brief in Opposition ("Resp. Br."), p. 5) As Petitioners will prove if this case is allowed to move past the pleading stage, this is patently untrue: the Cardiellos did not make late payments – in fact, paid over 400 days early -- as the lenders' own documents showing when Petitioners' payments were received will conclusively demonstrate.

In short, it is respectfully submitted that the assertion that Petitioners owed an additional $2,200 because they had paid late represents nothing less than an attempt by one of America's largest mortgage lenders to conceal widespread overcharges by deliberately misleading this Court.

THE CONSTRUCTION OF RESPA BY THE SECOND CIRCUIT WARRANTS THIS COURT'S REVIEW

The Second Circuit's dismissal of Petitioners' RESPA claims presents three distinct federal issues for review: (1) whether RESPA allows a lender to threaten a borrower with foreclosure before responding to the borrower's claim that the amount demanded was never owed; (2) whether RESPA requires actual damages; and (3) whether a lender can

comply with RESPA by "correcting" the borrower's account while refusing to acknowledge that it made an error.

(i) Letters Threatening Foreclosure

Respondents fail to cite a single authority – none -- which supports the holding that the "before taking any action" language in §2605(e)(2) actually forbids only "significant action" such as the commencement of foreclosure. Attempting to distinguish the interpretation of the virtually identical language in §1666 of TILA -- the statute from which RESPA §2605(e)(2) was modeled -- Respondents misquote the statute, saying it prohibits "any attempt to collect the disputed amount." (Resp. Br., p. 12)

Rather, like §2605(e)(2) of RESPA, §1666 requires a lender to investigate a claim of billing error *"prior to taking any action* to collect the amount."[1] Interpreting this statutory language, this Court found that "the creditor must send its explanation before making any attempt to collect the disputed amount." *American Express v. Koerner,* 452 U.S. 233, 237 (1981) Moreover, in forbidding lenders from "taking any action" in §1666, Congress specifically stated that this language meant that *"creditors cannot send out dunning letters* . . . until the creditor has complied with the requirements for resolving billing inquiries." (Report of the Senate Comm. on Banking, Senate Report No. 93-78, p. 5 (emphasis added))

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[1] As one court explained, the reason RESPA §2605(e)(2) uses different language after "before taking any action" is because "the RESPA borrower inquiry provision applies not only to billing error inquiries but to any request for information. . . while the billing error notice provision of TILA applies only to billing errors." *Cortez v. Keystone Bank,* 2000 WL 536666, *11 (E.D. Pa. 2000)

Neither Respondents nor the Second Circuit offer any basis for interpreting the "before taking any action" language in RESPA's billing error correction provision differently than the same language in the billing error provision in §1666. While Respondents characterize the letter threatening foreclosure as "an innocent standard demand letter", (Resp. Br., p.12), the Senate Report makes clear that that is precisely the type of "action" Congress meant to foreclose until an alleged error has been investigated and responded to by the lender. Since mortgages are not covered by §1666, unless this Court grants Certiorari, millions of borrowers will be left open to such improper threats by lenders demanding payment of amounts which may not be owed.[2]

(ii) The Need for Actual Damages

Other than the holding below, Petitioners are unaware of a single decision under any federal statute regulating the lender/borrower relationship in which actual damages have been held a prerequisite to suit. Nor have Respondents cited any authority supporting the Second Circuit's conclusion.

The claim that Petitioners did not allege a "pattern or practice" of RESPA violations is patently false (See A. 18, ¶ 54 ("Defendants have engaged in a pattern or practice of noncompliance")), as is Respondents' claim that Petitioners "abandoned" their contention that they suffered actual damages in the Petition to this Court. (See Petition, p. 17 n.11 ("Petitioners did suffer damages as a result of the RESPA violation, which forced them to hire an attorney and incur other expenses"))

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[2] Money Store's contention that Petitioners never raised the argument that the letter constituted prohibited "action" below is demonstrably false, as the District Court Opinion demonstrates. App. 15a ("plaintiffs contend that defendants' demands for payment in their letter of June 21, 2000 . . . constituted "taking action" which plaintiffs argue RESPA forbids")

(iii) The Requirement that the Lender Acknowledge the Error

Respondents contend that Petitioners engage in "an unduly technical reading of RESPA" in alleging that, contrary to the Second Circuit's determination that "technical compliance" with §2605 is less important than the "bottom line", lenders must expressly acknowledge an error to avoid RESPA liability. According to Respondents, "the statute does not require a mea culpa." (Resp. Br. at 15)

However, like the courts below, Respondents make no attempt to reconcile this conclusion with the language in §2605(f)(4) requiring servicers to not only make corrections in the account of the borrower to avoid RESPA liability, but also to *"notif[y] the person concerned of the error."*[3] (See App. 55a) Nor do the Respondents dispute that -- once an error in debt calculation is discovered -- both RESPA and TILA require lenders to make corrections in the accounts of all other similarly affected borrowers. (See 15 U.S.C. §§1640(b), 1607(e)(6); 12 U.S.C. § 2605(f)(4))

By de-emphasizing "technical compliance" with RESPA in favor of "the bottom line", the Second Circuit has removed any incentive for lenders to meaningfully investigate and correct mistakes affecting multiple borrowers.

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[3] As did the Second Circuit, Respondents violate a cardinal rule of statutory construction in contending that lenders can comply with §2605(e)(2)*(A)* of RESPA (requiring lenders to correct errors and notify borrowers thereof) by following the separate requirement contained in §2605(e)(2)*(B)* (requiring lenders to explain why no error occurred). It is well settled that in "construing a statute, a court should interpret subsections written in the disjunctive as setting out separate and distinct alternatives." *In re Pacific Trading Co.*, 64 F.3d 1292, 1302 (9th Cir. 1995). Thus, "language in a clause following a disjunctive is considered inapplicable to the subject matter of the preceding clause." *Brown v. Budget Rent A Car*, 119 F.3d 922, 924 (11th Cir. 1997).

Just as Money Store is alleged to have done here, lenders may negligently or fraudulently demand substantial additional payments, and as long as they ultimately "waive" the additional amount sought from the complaining borrower, they need not acknowledge their error, much less remedy it in other accounts. As a result, the Second Circuit's holding not only diminishes the ability of borrowers to uncover widespread and systematic errors in customer accounts, but also the possibility that lenders will correct them.

THE CONSTRUCTION OF TILA BY THE SECOND CIRCUIT WARRANTS THIS COURT'S REVIEW

Also at issue is the question of whether, at the maturity of a mortgage loan, TILA permits a lender to demand and collect payments in excess of those originally disclosed without violating the statute. As the Petitioners previously demonstrated, Congress and the Federal Reserve Board clearly appear to prohibit such conduct: §1640(b) of TILA requires lenders to make adjustments in an account "to assure that the person will not be required to pay an amount in excess of the charge actually disclosed", and §1666d[4] of TILA and §226.21 of Reg. Z each require the refunding of excess payments made by a borrower at a mortgage's conclusion.

Nevertheless, ignoring these statutes, the Second Circuit holds that borrowers who are subjected to such excess charges have no TILA remedy. In affirming dismissal of Petitioners' TILA claims on statute of limitations grounds, and in rejecting the TILA claim *sua sponte* on the merits, the Second Circuit adopted the District Court's conclusion that

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[4] Unlike §1666 of TILA, §1666d "applies to any type of credit account, not just open end accounts." (Senate Report 96-73 to P.L. 96-221, p. 20)

"plaintiffs' arguments reflect a basic misunderstanding about the breadth of TILA's application." (App. 12a) According to the Second Circuit, Congress did not "inten[d] . . . to extend TILA liability far beyond the loan transaction itself." (App. 12a) Therefore, the court concluded, TILA claims "accrue at the time loans are made, not upon each payment inconsistent with the [TILA Disclosure] statements terms", and any actions taken by the lender to collect additional amounts at the loan's conclusion "are moot." (App. 11a)

It is impossible to reconcile the Second Circuit's holding with any of the above TILA statutory provisions, and Respondents do not even try. Instead, they seek to insulate the Second Circuit's conclusion from review by claiming that Petitioners did not raise the question of whether Respondents collected amounts in excess of those originally disclosed until they reached the Second Circuit. This argument is baseless. In fact, the June 8, 2000 letter from Petitioners' attorney which Respondents claim "had not contended that the Cardiellos had paid early and did not ask for a refund" (Resp. Br., p. 5) *did precisely that:*

> [T]he Cardiellos have routinely made payments on time, and in fact . . . paid early by a total of 401 days over the course of the loan. Under these circumstances, early payment should have decreased, not increased, the finance charge. (Supplementary App. 1)[5]

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[5] Moreover, Petitioners repeatedly alluded to the issue of excessive payments in their Complaint, and argued the issue before the District Court, which is what led the court to conclude that TILA claims do not accrue "upon each payment inconsistent with the statement's terms." (App. 12a)

With all due respect, Petitioners believe that it is the Second Circuit's conclusion – not Petitioners – which "reflect[s] a misunderstanding about the breadth of TILA's application." (App. 12a) As is evident from §1640(b), §1666d and §226.21, Congress required lenders subject to TILA to not only accurately disclose the total payments to be made at the outset of a Loan, but to *adhere* to those disclosed amounts in their subsequent demands for payment.

Yet the Second Circuit now holds that "TILA claims for inaccurate disclosure statements accrue at the time loans are made, not upon each payment inconsistent with the statement's terms." (App. 11a) The effect of this holding is to make the statutory right to receive a Disclosure Statement accurately reflecting the amount the lender will ultimately demand completely dependent on when the loan occurred. Since, according to the court below, the TILA statute of limitations always expires after a mortgage loan's first year, a lender may deliberately demand "payments inconsistent with the disclosure statement's terms" at any point thereafter, and borrowers like Petitioners will have no TILA remedy.[6]

Neither the Respondents nor the Second Circuit provide any explanation for how this result is consistent with any of the above-referenced statutory provisions or TILA's express purpose of "protect[ing] the consumer against inaccurate and unfair credit practices." 15 U.S.C. §1601.

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[6] Indeed, at oral argument, members of the court questioned whether TILA ever imposes an obligation on the lender to adhere to the payment amounts originally disclosed:

> MR. GROBMAN: We have a right and they have an obligation to accurately disclose and adhere to the amounts on the TILA disclosure statement. . .
> JUDGE JACOBS: Where do you get the adhere? Where do you get the adhere? They have to disclose it. (App. 40a)

THE ISSUE OF IMPROPER PROCEDURES BELOW

With regard to whether the courts below substantially departed from the "accepted and usual course of judicial proceedings" in reaching their determination, Respondents do not dispute that the Second Circuit had no right to decide the merits of the TILA claim under *Singleton v. Wulff*, 96 S.Ct. 2868 (1976), and are left to argue that "the Second Circuit did not base its affirmance on the merits." (Resp. Br., p. 28)

Moreover, in their Brief, Respondents emphasize one of the affirmed "findings" which resulted from what Petitioners have shown to be a patently improper judicial determination:

> As the District Court correctly explained, the Cardiellos could have determined the basis for their claim *by merely comparing the loan documents with their account statements.* (Resp. Br., p. 29 (emphasis added))

As Petitioners advised the Second Circuit on appeal, neither the "loan documents" nor the "account statements" were submitted by Respondents on their Rule 12(b)(6) motion, and indeed the only reference to what they would have shown had they been in the Record was *in the Respondents' Brief.* Thus, Respondents claim that the courts below did not violate *Carter v. Stanton,* 92 S.Ct. 1232, 1234 (1972) in considering these documents but rather followed the "established rule that documents referenced in the pleading are deemed part of it on a Rule 12(b)(6) motion" (Resp. Br. at 29) is meritless, since the account statements and loan documents were *never* referred to in Petitioners' Complaint.

Equally baseless is the Respondents' claim "that the courts below did not take "judicial notice"" of what a comparison of the account statements and loan documents would have shown – a violation of *Scheuer v. Rhodes*, 416 U.S. 232, 249-50 (1974) -- but rather followed the "rule that a court may consider documents which the Complaint shows are pertinent but which the plaintiff has not made a part of it." (Resp. Br. at 29) Again, neither the District Court nor the Second Circuit was presented with the account statements or loan documents, and thus were in no position to even refer to, much less make findings on, what a comparison of their contents would have shown. *U.S. v. Boyd,* 289 F.3d 1254, 1258 (10th Cir. 2002), ("if a court takes judicial notice of a fact whose application is in dispute, the court removes the weapons of rebuttal evidence and cross-examination . . . and raises doubt as to whether the parties received a fair hearing")

CONCLUSION

The Petition for Certiorari should be granted.

Respectfully submitted,
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(212) 983-5880

CERTIFIED MAIL;
RETURN RECIEPT REQUESTED
The Money Store
PO Box 13716
Sacramento, California 95853-3716

Re: Loan Number 0070294996; Sam & Maria Cardiello 8 Gale Lane, Patchogue, New York 11772-4219

Dear Sirs,

I represent Sam and Maria Cardiello with regard to the above-referenced loan. It is my understanding that, despite the Cardiello's payment of the entire amount indicated in the mortgage, The Money Store alleges that some $2,200.00 remains outstanding on the loan.

It is difficult to understand how you arrived at this determination, since the Cardiellos have routinely made payments on time, and in fact, by my rough estimation, paid early by a total of 401 days over the entire course of the loan. Under these circumstances, early payment should have decreased, not increased, the finance charge.

Under these circumstances, I request a specific detailed explanation for The Money Store's position that money is owed by the Cardiellos.

Very truly yours,

Paul Grobman